secular textbooks depend upon attendance at a "standard" elementary school, not upon attendance at a public school; (2) it created an incentive for all the schools in Oregon to meet certain educational standards established by the State Board of Education.

As noted by the Attorney General below (Brief, p. 5), the revised Oregon free textbook statute "represents a general program of public welfare legislation to help parents to provide the necessary textbooks for their children in pursuing their education which, under the laws of this state, is made compulsory." The 1941 expansion of the statute to include pupils attending private as well as public standard schools represented a conscientious effort by the Oregon legislators to include all children attending public or private schools which meet the requisite state standards.

But this 1941 extension demonstrated something more than a desire to aid the pupils attending private standard schools and the parents of such pupils. It also indicated, in the words of Judge Rossman's dissent below, a legislative wish "to improve the quality of the denominational schools" and "to bring to the avail of the pupils in denominational institutions textbooks which the legislature favored." The legislature, Judge Rossman said, was concerned with "the youth of Oregon and believed that textbooks chosen by the State Board of Textbook Commissioners would afford superior education to those selected by the denominational schools." See pp. 23a, 25a, *infra*.

Thus under the version of the free textbook law in effect, the sole requirement for the eligibility of children is attendance at a school meeting special academic standards set by the state. There is no preference for

those attending public standard schools and no discrimination against those attending private standard schools, whether church-related or otherwise.

(2) The Relevant Facts of This Case

Insofar as relevant to the resolution of the federal constitutional issues in this case, the following facts were established at the trial in the Circuit Court for Clackamas County:

a. St. John the Apostle School is an elementary parochial school in Oregon City, Oregon, situated within the boundaries of School District No. 62C. It is maintained and operated by the Roman Catholic Church and provides both secular education and religious instruction for its pupils. Tr. 233-234. According to the Supervisor of Elementary Education of the Oregon State Department of Education, who observed class room instruction at St. John's, the school's method of instruction in such secular subjects as arithmetic and spelling is substantially the same as in the public schools. Tr. 233-234.

b. A course in religion, covering the Catechism and Catholic dogma, occupies 20 to 30 minutes each day in the curriculum of each grade at St. John's. Tr. 107-108. Father Thielen, Superintendent of Catholic Schools in the Archdiocese of Portland with jurisdiction over St. John's School, testified with respect to the secular curriculum (Tr. 160):

> "We have a tradition in our Oregon schools that our curricula are in basic agreement. First of all, we teach the same subjects; we require that the same subjects be taught in parochial schools as are taught in public schools. We are very much influenced by State scope and sequence; in fact, I should say that in general we follow it."

He further stated (Tr. 207):

> "If is made very clear to teachers in our schools that while the motivation of our studies is religious, when we come to matters in our course content that are secular, shall we say, that that is not the time for teaching religious content. In other words, it is strongly emphasized in our schools that we do not confuse the teaching of secular subjects with the teaching of religion."

On the other hand, Professor Guy, Associate Professor of Education at Portland State College, testified generally—but without personal observation of and without specific reference to St. John's—that in parochial schools religion permeates the whole curriculum and is not confined to a single half hour per day. See Tr. 186-187.

c. St. John's at all material times has qualified as a standard elementary school as defined in ORS 337.150 and has been so certified. Tr. 16-18.

d. As a result of such certification, pupils attending St. John's have been accorded the same free use of state-adopted textbooks as is provided for pupils in the public schools in School District No. 62C. Tr. 13, 24-25, 38, 45.

e. These textbooks are all stamped "School District No. 62, Oregon City" and are delivered by the School District to the various public and private schools for distribution to the pupils. Such delivery is made in accordance with enrollment lists supplied by the schools. Teachers' editions of these books are also supplied to the schools. Tr. 16, 20, 38-39. The ownership of these books remains at all times in the School District.

f. All of the books delivered for the use of pupils attending St. John's are secular in nature, none of them being religious. They are all identical with those delivered for the use of public school pupils. Tr. 39-40. The total cost of books furnished to the St. John's pupils was $1,033.87 in 1957-58, $1,275.76 in 1958-59, and $1,750.57 in 1959-60 to the time of trial. Ex. 6. The full amount budgeted for 1959-60 was $2,500. Tr. 34

g. The Catechisms, social studies books and other books dealing with religious matters, which are also used in St. John's, are purchased by parents through the Diocesan office or supply houses. Tr. 103-104. These books are not supplied by School District No. 62C. Tr. 99.

h. The respondents Dickman, Salisbury and Smelser, who instituted the instant proceeding, are taxpayers residing within the boundaries of School District No. 62C. As taxpayers, they contribute to the cost of providing and distributing the textbooks to standard elementary schools in that district, including St. John's. Tr. 4.

i. Petitioner Carlson, who was allowed to intervene and participate in the proceedings, is a property owner and voter residing within the boundaries of School District No. 62C. Five of his children are enrolled in and attend St. John's School and they have received the free use of text books supplied through School District No. 62C. If they had not been furnished by the School District, Carlson would have had to buy these secular books. Tr. 210-211. Petitioner Carlson pays the annual $60 tuition at St. John's for each of his children, in addition to the $10 "book bill" for each child out of which is purchased religious books not supplied by the state

(3) History of This Litigation

This equity suit was instituted in the Circuit Court for Clackamas County, Oregon, by the three taxpayers identified herein as the respondents Dickman, Salisbury and Smelser. They sought to enjoin the respondent School District No. 62C, its board members and its clerk from supplying textbooks without charge for the use of pupils enrolled in St. John's School. They also sought a judicial declaration that the free textbook statute (ORS 337.150), under which distribution was made to the pupils of St. John's and other parochial schools, does not authorize the officials of the School District to provide textbooks without charge for use in church or parochial schools. Alternatively, they prayed that, if the statute be construed to authorize such distribution, it be declared in violation of the Constitution of the United States and the Constitution of the State of Oregon.

After being allowed to intervene, petitioner Carlson filed an answer to the complaint. The respondent School District and its officials also filed an answer.

On February 2, 1960, following a trial, the Circuit Court ruled (1) that there is no essential difference between the provisions of Article I, Section 5, of the Oregon Constitution and the First Amendment of the Federal Constitution respecting freedom of religion and the establishment of religion, and (2) that the ruling of this Court in *Everson* v. *Board of Education,* 330 U.S. 1, controlled this case as to the validity of the Oregon free textbook statute under both Constitutions. The statute was accordingly held constitutional, the complaint was denied and judgment was rendered in

favor of petitioner Carlson and the respondent School District and its officials.

The respondents Dickman, Salisbury and Smelser then appealed to the Supreme Court of the State of Oregon. The Attorney General of the State of Oregon appeared as *amicus curiae* in support of the position taken by petitioner Carlson and the respondent School District and its officials, urging that ORS 337.150 is constitutionally valid in all respects.

On appeal, a majority of the Supreme Court of the State of Oregon on November 15, 1961, reversed the judgment of the Circuit Court and directed that a decree be entered in accordance with the prayer of the complaint. It held that the statute in question was invalid solely by virtue of Article I, Section 5, of the Oregon Constitution, prohibiting the use of public moneys "for the benefit of any religious or theological institution." The furnishing of secular textbooks to parochial schools was said to constitute a substantial benefit to religious institutions within the meaning of that state constitutional provision. This conclusion was compelled, in the majority's view, "because such books are an integral part of the educational process" and "the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John's school." While stating that the decision in *Everson* v. *Board of Education*, 330 U.S. 1, was not relevant to an adjudication of constitutionality under the Oregon Constitution, the majority expressed its total disagreement with the holding of this Court in that case.

The Supreme Court of the State of Oregon thus found it unnecessary to consider the contentions that

the state statute was also violative of the First or Fourteenth Amendments to the United States Constitution. But the majority did consider and did pass upon the petitioner Carlson's claim[3] that "the denial of the use of free textbooks to pupils solely because they attend parochial schools would constitute a violation of the equal protection clause of the Fourteenth Amendment." In rejecting that claim, the majority ruled (p. 20a, *infra*):

> "The argument is without merit. The classification which excludes such pupils from the state's bounty is not only reasonable, it is commanded by the constitution itself."

Judge Rossman dissented, stating that the *Everson* ruling was correct and that it was directly applicable to an interpretation of a constitutional principle that is the same in both the state and federal constitutions.

Petitioner Carlson filed a timely petition for rehearing, which was denied on March 13, 1962.[4] That petition, which is part of the certified record before this Court, raised *inter alia* the following federal constitutional claims arising out of the decision of the Oregon Supreme Court:

> (a) The majority's construction of Article I, Section 5, of the Oregon Constitution "would deny to parochial school pupils and their parents the

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[3] This claim was originally made in petitioner Carlson's pleadings in the trial court (Par. VII of Answer, Ab. 15) and in his brief on appeal (Br., pp. 18-19).

[4] The Attorney General as *amicus curiae*, as well as the School District and its directors and [redacted]rk, joined in the petition for rehearing.

religious liberties guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States." (pp. 39-45).

(b) The majority's construction of Article I, Section 5, of the Oregon Constitution "would operate to deny to parochial school pupils and their parents due process of law and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States." (pp. 46-51).

To the extent that these federal constitutional questions were not anticipated by petitioner and expressly passed upon in the majority opinion below,[5] these questions were timely raised in the petition for rehearing. The majority decision, holding the statute invalid under the Oregon Constitution, could not have been reasonably anticipated from prior decisions of that court. And only after this decision was rendered, containing a new construction of the Oregon Constitution with reference to the state statute in question, did these federal constitutional issues emerge in their full context. Thus, raising those issues for the first time in the petition for rehearing was timely. *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-678; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-367.

[5] The majority opinion, of course, did expressly pass upon the claim that "the denial of the use of free textbooks to pupils solely because they attend parochial schools would constitute a violation of the equal protection clause of the Fourteenth Amendment."

REASONS FOR GRANTING THE WRIT

This case raises the nationally significant question whether the First and Fourteenth Amendments to the Constitution of the United States preclude a State from utilizing the exercise of a parental and religious right as a basis for classification for the conferral or withdrawal of public and secular educational benefits. More particularly,

(1) Can a State discriminate in the dissemination of public welfare benefits against those children who attend church-related schools, in contrast to those children who attend private or public nondenominational schools?

(2) Can a child be denied the free use of the same spelling book distributed freely to children attending other "standard" schools simply because his parents have sent him to a school which is both "standard" and religious in philosophy and practice?

(3) Can the child's parents be denied the educational and economic benefits of such free textbook distribution merely because they have, in the exercise of their constitutional right to choose a non-public school for their child, selected a school which is both "standard" and religiously-oriented?

These problems touch the heart of the universally felt need for more and better education. The State of Oregon has not sought here to confine its textbook bounty to those children attending public, as distinguished from non-public, schools. Rather it has attempted to distribute secular textbooks freely to all children attending schools meeting certain state standards, whether those schools be public or private in nature. The state legislature, moreover, has felt that the educational interests of the State in general and the secular quality of the private schools in par-

ticular would be advanced by extending the free textbook program to those attending all "standard" schools. The legislature accordingly established a broad classification in terms of "standard" schools, without reference to any other characteristic. To the extent that the religious nature of such "standard" schools is now held to preclude the free distribution of secular textbooks, this broad educational purpose formulated by the state legislature is frustrated.

More importantly than the frustration of such legitimate community educational efforts, serious constitutional problems are created by such a religious classification. And it is those problems to which this Court adverted in *Everson* v. *Board of Education*, 330 U.S. 1, 16, when it warned against prohibiting a State "from extending its general law benefits to all its citizens without regard to their religious belief." Religion cannot be put in a privileged position. Neither can it be placed in an underprivileged position.

The decision below, interpreting the Oregon Constitution, has directed a withdrawal after twenty years of the free use of secular textbooks from all those who receive religious training in their schools. Religion and religious training have been made the sole basis for determining, from among pupils attending "standard" elementary schools, who shall and who shall not receive and use the secular textbooks supplied by the respective School Districts. The constitutionality of such a classification is thus raised in concrete and unmistakable form.

This issue warrants and indeed necessitates the most careful and plenary consideration by this Court. Such review is made particularly appropriate by the fact that the classification established by the court below

appears to be in direct conflict with the First and Fourteenth Amendments and with the applicable decisions of this Court.

(1) The Equal Protection Issue

The court below flatly held that the Equal Protection Clause of the Fourteenth Amendment permits the denial or withdrawal of the use of free secular textbooks by pupils "solely because they attend parochial schools." The textbooks are to be withdrawn from their use since "the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John's school." Such a classification, said the court, "is not only reasonable, it is commanded by the [State] constitution itself."

Here, then, is a classification in patently religious terminology, utilized to determine who shall receive the benefits of public welfare legislation. That type of classification is of the essence of the invidious discrimination outlawed by the Equal Protection Clause. And any judicial approval of such discrimination is directly contrary to this Court's decision in *Everson v. Board of Education*, 330 U.S. 1—a decision with which total disagreement was expressed by the court below.

In the *Everson* case, this Court declared that a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation." 330 U.S. at 16. Furthermore, said this Court, a State cannot be prohibited "from extending its general state law benefits to all its citizens without regard to their religious be-

lief." 330 U.S. at 16. These statements were accompanied by an express acknowledgment, 330 U.S. at 7, of the public welfare nature of a state statute designed to provide free secular textbooks to all school children, including parochial pupils.[6] Hence the *Everson* case teaches that the benefits of precisely the type of state bounty here enacted by the Oregon Legislature cannot be withheld from some children solely because they are Catholics or solely because they attend parochial schools.

True, the *Everson* case dealt primarily with the validity, under the Religious Establishment Clause of the First Amendment, of state legislation providing bus transportation for parochial school pupils. But the Court's remarks concerning the constitutional impropriety of withholding the benefits of public welfare legislation on the basis of religious beliefs bespeak of equal protection guarantees. Indeed, it has been said by one commentator that the commands of the Freedom of Religion and the Religious Establishment Clauses of the First Amendment "would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, *i.e.*, they must be read to mean that religion may not be used as

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[6] The Court stated, 330 U.S. at 7, that "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." A citation was then made to *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, where a Louisiana statute substantially similar to the one enacted here by the Oregon Legislature was sustained under the Due Process Clause of the Fourteenth Amendment. The Louisiana statute provided for the supplying of secular textbooks free of cost to the school children of the state, including those attending private and church-related schools.

a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."[7]

The purely religious nature of the classification said to be imposed by the Oregon Constitution is plainly evident. The privilege of receiving and using free secular textbooks is made to depend upon a religious factor—whether the child attends a parochial school where religious precepts are taught as an inseparable part of the curriculum. At the same time, the privilege remains available to pupils attending private nonreligious schools. Thus no question is presented as to the propriety of a classification in terms of those attending standard schools or in terms of those attending public schools. Religious considerations alone mark the dividing line.

Were free textbooks to be dispensed by the State of Oregon solely on the basis of the race or color of the pupils, the Equal Protection Clause would obviously preclude such a classification. See *Brown* v. *Board of Education*, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1. Just as a Negro cannot be denied the benefits of a state law designed to promote the general welfare of

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[7] Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 5 (1961). In analyzing the *Everson* opinion, this commentator concludes (p. 70): "In short, a classification in terms of public and non-public schools would be valid. A classification in terms of religion would be invalid."

See *State ex rel. Reynolds* v. *Nusbaum*, 30 Law Week 2623 (Wis. Sup. Ct., June 5, 1962), where a portion of a state statute, construed by the Wisconsin court to provide bus transportation for parochial students only, was held to confer a benefit on "those religious groups which operate parochial schools" and hence to constitute an invalid religious classification. The court relied heavily on the Kurland article to support the thesis that a religious classification is improper.

the citizenry, so too a Methodist, a Christian Scientist or a Catholic—or one who is taught particular religious precepts—cannot be denied such benefits. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100; *Torcaso* v. *Watkins*, 367 U.S. 488. As a norm for state action of a general public welfare nature, religion is as invidious as race or color.[8]

Such a conclusion does not imply that a State is under constitutional compulsion to supply free textbooks or other benefits to those who attend parochial or other private schools. A State may limit or condition the dispensation of its benefits on any reasonable basis it sees fit, such as a basis in terms of those attending public schools. But the basis cannot be in religious or racial terminology. Thus while a State is not required to provide free polio shots to children attending parochial schools, once it institutes a general immunization program for all children it cannot exclude therefrom Methodist, Jewish or Catholic children, or those children receiving religious training. It is that type of invidious religious discrimination that has been established by the court below.[9]

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[8] See also *Chance* v. *Mississippi State Textbook Board*, 190 Miss. 453, 200 So. 706, where a Mississippi statute providing for the distribution of free textbooks to the pupils of the elementary schools of Mississippi, including sectarian schools, was held valid. The court there stated that "The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all . . . there should be no religious disqualification in its private citizens for privileges available to a class to which they belong." Such a disqualification was said to "constitute a denial of equal privileges on sectarian grounds."

[9] Note Mr. Justice Jackson's comment in his dissent in the *Everson* case, 330 U.S. at 21: "Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private

Hence the Equal Protection Clause, implemented by the *Everson* decision, renders nugatory the classification decreed by the Oregon court. That such classification was thought to be dictated by the provisions of the Oregon Constitution is no justification. A state constitution, no less than a state statute or some other form of state action, must yield to the principles of the Equal Protection Clause. *Neal* v. *Delaware,* 103 U.S. 370.

(2) The Due Process Issue

The Equal Protection Clause of the Fourteenth Amendment prohibits invidious discrimination. The reach of the Due Process Clause of that Amendment is broader, however, in that it prohibits arbitrary burdens upon the exercise of substantive rights. It thus outlaws the attachment of unconstitutional conditions to the eligibility standards for receipt of privileges and benefits. See *Speiser* v. *Randall,* 357 U.S. 513, 518-519.[10]

The important question here raised is whether the Due Process Clause permits a State to condition the bounty of free secular textbooks on the surrender of the parental and religious rights to send one's child to a denominational school. In other words, does the Due Process Clause permit a State to push its doctrine

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school complaining of discrimination." As he further said of the *Everson* case, "If it could, in fairness, have been said that the expenditure was a measure for the protection of the safety, health or morals of youngsters, . . . it would have been unconstitutional to refuse it [bus transportation] to any child merely because he was a Catholic." *McCollum* v. *Board of Education,* 333 U.S. 203, 233 (concurring opinion).

[10] See Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 Cornell L.Q. 12 (1955); Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1599-1600 (1960); French, *Unconstitutional Conditions: An Analysis,* 50 Georgetown L.J. 234 (1961).

of separation of church and state to the point where secular benefits are denied simply because parents have exercised their constitutional right to send their children to schools in which religious precepts are taught?

This Court has unanimously held that parents have the right to discharge their duty under state compulsory education laws by sending their children to non-public rather than public schools, provided that reasonable state educational requirements are thereby met. *Pierce* v. *Society of Sisters*, 268 U.S. 510. This right was there considered to be a parental right, independent of religious ramifications. And see *Meyer* v. *Nebraska*, 262 U.S. 390, 399-402. In *Everson* v. *Board of Education*, 330 U.S. 1, this Court treated this right as one also partaking of a religious character under the First Amendment insofar as it relates to the choice of a non-public religious school meeting reasonable state standards. 330 U.S. at 16, 18 (majority opinion); at 27 (Jackson, J., dissenting); at 51 (Rutledge, J., dissenting). The right of the parent in this case is thus a double one: a parental right to choose any academically qualified school, public or non-public, and a religious right under the First Amendment to choose a religious school that is academically qualified.

In this instance, those parents who have exercised the freedom of parental and religious choice which the *Pierce* and *Everson* cases made secure have been financially penalized and excluded from benefits designed by the Oregon Legislature to be available to all parents of children attending "standard" schools. Because, and only because, they have exercised that freedom of choice they must suffer the economic and educational pains implicit in the withdrawal of such state aid. A penalty has been imposed on those who would seek to follow the demands of their parental and religious conscience. In short, the constitutional right of religi-

ous freedom, though inherent and free as to some, must here be purchased by parochial school parents. The significance of such a result under the Due Process Clause is at once obvious.

What legitimate state policy can be advanced to sustain such a serious condition on the exercise of these parental and religious rights? To say that the state concept of separation of church and state justifies such a discrimination is to beg the question, for the validity of that state-created concept in these circumstances is precisely the focal point of this constitutional inquiry. The Supreme Court of the State of Oregon has simply assumed that the policy of separating church and state is an end in and of itself, without regard to the impact on federal constitutional rights that may be created. The fact that the religious classification was thought to be "commanded by the [state] constitution itself" was said by the court to be an adequate answer to any federal equal protection claim—and presumably to any federal due process claim.

But federal constitutional rights are not to be disposed of so cavalierly, particularly when those rights relate to the exercise of a state power which this Court has repeatedly sustained. In *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, this Court without dissent ruled that a textbook distribution statute similar to that enacted by the Oregon Legislature, whereby parochial school students were included among those receiving the free use of textbooks, is a permissible exertion—for purposes of the Due Process Clause of the Fourteenth Amendment—of state power for a broad public purpose, to wit, public education.[11] And in *Everson* v. *Board of Education*, 330 U.S. 1, it

[11] The majority opinion below disposed of the *Cochran* case by listing it as one in which "there simply has not been any real analysis of the problem." See p. 10a, *infra*, fn. 19.

was made plain that such legislation is of a public welfare nature which permits of no demarcations of a strictly religious nature. From the standpoint of the Federal Constitution, therefore, such legislation provides a general program to help parents secure a secular education for their children, regardless of their religion.

Thus *Cochran* and *Everson* hold that the First and Fourteenth Amendments construct no barrier to the *extension* by a State of secular benefits (such as textbooks and transportation) to children attending religious schools meeting state educational standards. The question left in this case is whether those Amendments create a barrier to the *exclusion* of such children from secular benefits solely because the schools they attend incorporate religious instruction. As yet, no great policy of the State of Oregon has been advanced which would authenticate, for purposes of the Due Process Clause, the discriminatory condition which has been placed on the exercise of the parental and religious rights of the parents to send their children to such denominational schools. The absence of such a decisive state interest leads to the outlawry of the condition. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Torcaso* v. *Watkins*, 367 U.S. 488. The freedom of parental and religious choice enshrined in the First and Fourteenth Amendments prohibits this discriminatory burden.

(3) The Religious Freedom Issue

An inseparable part of the Due Process Clause of the Fourteenth Amendment is the freedom of religion guaranteed by the First Amendment. And, as already indicated, the parental right to select a religiously-oriented training for children partakes of that First Amendment religious freedom. See *Everson* v. *Board of Education*, 330 U.S. 1. Intentional discrimination

against that right, as accomplished by the classification adopted below, interferes with and burdens that right in a manner proscribed by the First Amendment. In the context of this case, a discriminatory price tag has been placed on the religious freedom available to this petitioner. Solely and only because he chose to exercise that right of selecting a denominational school, he must pay an economic price—to wit, the price of secular textbooks for his children.

But just as government in this country is without power to prescribe by law any particular form of religious activity, see *Engel* v. *Vitale*, 370 U.S. (June 25, 1962), so too it is without power to prescribe any discrimination or burden directed against a particular form of religious freedom. Maintenance of that principle demands that the decision below be reviewed.

CONCLUSION

To the end that religious classifications may not be made a permissible basis for withdrawing the benefits of general welfare legislation from otherwise qualified individuals, this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon should be granted.

Respectfully submitted,

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July 11, 1962

Counsel for Petitioner

APPENDIX A

Opinion

No. 6960—November 15, 1961

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

DICKMAN ET AL., *Appellants*,

v.

SCHOOL DISTRICT NO. 62C ET AL., *Respondents*.

Appeal from Circuit Court, Clackamas County.

RALPH M. HOLMAN, Judge.

Argued and submitted September 6, 1961.

John D. Mosser, Portland, and *Leo Pfeffer*, New York City, argued the cause for appellants. With them on the briefs was Steve Anderson, Salem.

Paul R. Biggs, Oregon City, and *Roy F. Shields*, Portland, argued the cause and submitted a brief for defendants-respondents and intervenor-respondent. With them on the brief were F. Leo Smith and Randall B. Kester, Portland.

Robert Y. Thornton, Attorney General, and Catherine Zorn, Assistant Attorney General, Salem, submitted a brief amicus curiae in support of ORS 337.150.

Before MCALLISTER, Chief Justice, and ROSSMAN, WARNER, PERRY, SLOAN, O'CONNELL and GOODWIN, Justices.

REVERSED WITH DIRECTIONS.

O'CONNELL, J.

This is a suit in equity brought by plaintiff taxpayers against School District No. 62C, its board and clerk, to enjoin defendants from supplying textbooks without charge for the use of pupils enrolled in St. John's The Apostle School, a parochial school maintained and operated by the Catholic church. Plaintiffs also seek a judicial declaration

that the so-called free textbook statute (ORS 337.150), under which distribution was made to the St. John's school and other parochial schools, does not authorize defendants to supply textbooks free of charge to church or parochial schools, or if the statute is so construed that it be declared unconstitutional.

Ivan B. Carlson, a resident within School District No. 62C, whose children were enrolled in the St. John's school intervened.

The statute in question, ORS 337.150, reads as follows:

> "337.150 Free textbooks; duty to provide, 'standard school' explained. (1) Each district school board shall, in the manner specified in ORS 328.520 and 328.525, provide textbooks, prescribed or authorized by law, for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools or grades seven or eight of standard secondary schools.
>
> "(2) For the purpose of ORS 328.520, 328.525 and 337.150 to 337.250 a school shall be standard when it meets the standards of the State Board of Education, except with respect to those standards applying to the ratio of pupils to the acre of school site, the square feet of classroom floor space per pupil and the ratio of pupils to teachers in classrooms, and when all teachers engaged in classroom instruction in said school hold a valid Oregon teaching certificate of the proper teaching level. The holding of such a teacher's certificate shall be evidenced by annual registration with the county school superintendent of the county in which the school is situated."

Plaintiffs attack the constitutionality of the statute on four grounds; (1) it authorizes state aid to religion at public expense in violation of the First Amendment to the United States Constitution as made applicable to the

states by the Fourteenth;[1] (2) the furnishing of such textbooks constitutes a benefit to religious institutions contrary to the provisions of Article I, § 5 of the Oregon Constitution;[2] (3) it, in effect, imposes a tax for a nonpublic purpose and thus deprives plaintiffs of property without due process of law, and (4) it authorizes the expenditure of money not exclusively for the support and maintenance of the common schools and is, therefore, in violation of Artilce VIII, § 2 of the Oregon Constitution.[3]

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[1] The First Amendment provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2] Article I, § 5 provides: "No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly."

[3] Article VIII, § 2 provides: "The proceeds of all the lands which have been, or hereafter may be granted to this state, for educational purposes (excepting the lands heretofore granted to, and [aid] in the establishment of a university) all the moneys, and clear proceeds of all property which may accrue to the State by escheat, or forfeiture, all moneys which may be paid as exemption from Military duty, the proceeds of all gifts, devises and bequests, made by any person to the State for common school purposes, the proceeds of all property granted to the State, when the purposes of such grant shall not be stated, all proceeds of the five hundred thousand acres of land to which this State is entitled by the provisions of an act of Congress, entitled '*An act to appropriate the proceeds of the Sales of the public lands, and to grant* [illegible] *premption (sic) rights, approved the fourth of September 1841,*" and also the five per centum of the Net proceeds of the Sales of the public lands, to which this State shall become entitled on her admission into the union (if Congress shall consent to such appropriation of the two grants last mentioned) shall be set apart as a seperate (sic), and irreducible fund to be called the common school fund, the interest of which togather (sic) with all other revenues derived from the school lands mentioned in this section shall be exclusively applied to the support, and maintenance of common schools in each School district, and the purchase of suitable libraries, and apparatus therefor."

Plaintiffs rely principally upon the first two grounds in attacking the constitutionality of the statute. The trial court held ORS 337.150 constitutional. Plaintiffs appeal.

For a period of several years the defendant district has furnished free textbooks for the use of the pupils of St. John's school. In a period of three school years these books have cost the district approximately $4,000. The books were purchased by the district from money in its General Fund, a part of which was derived from taxes levied upon real property in the district, including real property owned by plaintiffs. Books furnished by the district under ORS 337.150, whether to public or to parochial schools, are delivered to the persons in charge of the schools—not to the pupils individually. The district also furnishes teacher's editions of each text. The district retains title to the books, a matter of little practical significanse however, because the books are not ordinarily retrieved by the district. Textbooks furnished for the use of parochial school students do not differ from those delivered to public schools. A school it not entitled to receive free textbooks unless it complies with standards established by the Oregon statutes as implemented by administrative regulation. The St. John's school met these standards.

The evidence establishes, and the trial judge found, that the purpose of the Catholic church in operating the St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the Archdiocese of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.[4]

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[4] Annotation 45 ALR 2d 742 (1956); Annotation 141 ALR 1144 (1942); Annotation 5 ALR 866 (1920). See Note, 41 Va L Rev 789, 795-98 (1955); Note, 47 Colum L Rev 1346 (1947).

Defendants first challenge plaintiffs' standing to raise any constitutional issue other than the violation of the due process clause of the Fourteenth Amendment. Plaintiffs have not shown, it is argued, a deprivation of any freedom guaranteed by the First Amendment since they do not sue as school children, parents of school children, or as persons whose own religious liberty is threatened. As will appear below, we have chosen to decide the issues presented in this case solely upon the basis of the Oregon Constitution. It is not necessary, therefore, to decide whether under federal law defendants' contention with respect to standing is sound.[5]

The question of plaintiffs' standing to assert Article I, § 5 in this cause is not directly raised by defendants. The Oregon cases on standing do not provide us with a clear guide. It has been held that for some purposes at lease a person contesting a public expenditure must plead and prove that the threatened action probably will result in a general increase in taxation.[6] Plaintiffs did not expressly alleged in their complaint that the expenditures made by the defendant district increase the tax burden upon them or upon taxpayers generally, although the claim

[5] Everson v. Board of Education, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946) recognized the standing of a taxpayer to assert the First Amendment in contesting state expenditures for parochial schools. See, Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv L Rev 1265 (1961).

[6] Morris v. City of Salem et al, 179 Or 666, 174 P 2d 192 (1946). Cf., State ex rel Durkheimer v. Grace, 20 Or 154, 25 P 382 (1890). State ex rel Shaw v. Ware, 13 Or 380, 10 P 885 (1886). See also Portland Gen. Elec. Co. v. Judd, 184 Or 386, 401-404, 198 P 2d 665, 612-613, 6 ALR 2d 547 (1948), which distinguishes cases holding that a taxpayer has no standing to attack election procedures from cases holding that a taxpayer may restrain an illegal expenditure of public funds. There is some confusion as to whether a representative suit instituted for the benefit of the public at large must be brought by or in the name of the State of Oregon or the appropriate state agency. Compare Terwilliger Land Co. v. City of Portland, 62 Or 101, 123 P 57 (1912) with Gosso v. Riddell, 123 Or 57, 261 P 77 (1927), and Vinton v. Hoskins, 174 Or 106, 147 P 2d 892 (1944).

that such an increase occurrs might be inferred from the allegations that plaintiffs are taxpayers, that public moneys were appropriated and expended in the purchase of textbooks for distribution to St. John's school and that this "constitutes the imposition of a tax."[7] The precise question of whether a taxpayer has standing to contest the expenditure of public moneys for the support of religious education has been passed upon by other courts. In some of the adjudicated cases the taxpayer has been accorded standing even in the absence of allegation or proof that he will be damaged in a pecuniary way.[8] And there is support for the proposition that the problem of standing will be overlooked when an issue of unusual importance is presented.[9]

In the instant case the issue of plaintiffs' standing was not raised by defendants' pleadings. If standing were a jurisdictional matter then, of course, defendants could raise the question at any stage in the proceedings. But we do not so regard it and we hold, therefore, that defendants' failure to raise the issue by a proper pleading constitutes a waiver of that issue.[10]

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[7] Accord Berghorn v. Reorganized School Dist. No. 8, 364 Mo 121, 260 SW 2d 573 (1953).

[8] See for example, Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss 453, 200 So 706 (1941); Mitchell v. Consolidated School Dist., 17 Wash 2d 61, 135 P 2d 79, 146 ALR 612 (1943). In some cases the question of standing is not discussed. Rawlings v. Butler, 290 SW 2d 801 (Ky 1956); Smith v. Donahue, 202 App Div 656, 195 NYS 715 (1922); Gerhardt v. Heid, 66 N D 444, 267 NW 127 (1936); Swart v. South Burlington Town School Dist., —— Vt ——, 167 A 2d 514 (1961) (United States Supreme Court appeal pending).

[9] Kuhn v. Curran, 294 NY 207, 61 NE 2d 513, rehearing denied 294 NY 963, 63 NE 2d 188 (1945), followed in Elkind v. City of New Rochelle, 163 NYS 2d 870 (1957); Peters v. New York City Housing Authority, 128 NYS 2d 224 (1953), *modified*, 238 App Div 801, 128 NYS 2d 712 (1954); 3 Davis, Administrative Law § 22.09, p. 246 (1958).

[10] See Portland Gen. Elec. Co. v. Judd, 184 Or 386, 394, 396, 198 P 2d 605, 609, 610 (1948). See also, 3 Davis, Administrative Law § 22.01, pp. 209-210 (1958).

The First Amendment, as interpreted in *Everson v. Board of Education*, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946) and Article 1, § 5 of the Oregon Constitution prohibit the use of state funds for the benefit of religious institutions. The principal issue presented to us is whether the expenditure of public funds by the defendant school district for the purpose of furnishing textbooks free of charge to pupils of a parochial school is within these constitutional prohibitions.

We have concluded that the expenditure authorized by ORS 337.150 is within the proscription of Article I, § 5 of the Oregon Constitution. It is unnecessary, therefore, to consider plaintiffs' contention that the statute violates also the First or Fourteenth Amendments to the United States Constitution. Nor is it necessary to consider whether Article VIII, § 2 of the Oregon Constitution has been violated.

Article I, § 5 prohibiting the use of public moneys "for the benefit of any religious or theological institution," was designed to keep separate the functions of state and church and to prevent the influence of one upon the other. In this respect our constitution follows the general pattern of other state constitutions and may be regarded as expressing, in more specific terms, the policy of the First Amendment as it has been explained in the Everson case.[1]

The historical setting in which constitutional provisions such as Article I, § 5 were written and the factors which prompted their adoption have been thoroughly explained elsewhere; it is not necessary, therefore, to restate those

[1] For various types of constitutional provisions see 50 Yale L J 917, 920 (1941); Note, 60 Harv L Rev 793, 794 (1947).

observations here.[12] We need only say that we regard the separation of church and state no less important today than it was at the time Article I, § 5 and its counterpart in other constitutions were adopted.[13]

The general policy is clear. Our problem is to determine whether that policy is violated by the distribution of free textbooks to parochial schools under ORS 337.150. A simple solution would be to declare that Article I, § 5 prohibits the legislature from conferring *any* benefit upon religious institutions including church supported schools, no matter how indirect it might be. But the principle of separation of church and state has not been applied in such strict form. A certain amount of interplay of influ-

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[12] See McCollum v. Board of Education, 333 US 203, 213, 68 S Ct 461, 466, 92 L Ed 649, 659 (1947) (concurring opinion); Everson v. Board of Education, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946); Judd v. Board of Education of Union Dist., No. 2, 278 NY 200, 15 NE2d 576, 118 ALR 789 (1938); Carey, A History of the Oregon Constitution (1926); Hudspeth, Separation of Church and State in America, 33 Tex L Rev 1035 (1955); Konvitz, Separation of Church and State: The First Freedom, 14 Law & Contemp Prob 44 (1949); Note 60, Harv L Rev 793 (1947); Note, 50 Yale L J 917 (1941).

[13] Some of the reasons for this separation, as expressed by the courts and legal writers, are: Everson v. Board of Education, supra, 330 US at 11, 67 S Ct at 509, 91 L Ed at 721, "The people * * * reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions * * *"; Judd v. Board of Education, supra, 278 NY at 209, 15 NE2d at 581, "A policy of that kind [state aid to religion] * * * would open the door for a dangerous and vicious controvery among different religious denominations as to who should get the largest share of school funds"; Fahy, Religion, Education and the Supreme Court, 14 Law & Contemp Prob 73, 90 (1949), "This policy * * * is a recognition of an ancient realization of the distinct functions of a temporal government and of a church concerned with the supernatural:", Note, 50 Yale L J 917, 926, n. 58 (1941), "Acceptance of public funds by Catholic schools would result in state control over the manner in which the funds were used, and the schools would lose most of their present independence."

ences exercised by state and church has been permitted. It is not difficult to cite examples. Thus, we find that provision is made for chaplains in both houses of Congress and in the Armed Forces; for chapel services at West Point and Annapolis; sessions of the legislature are opened with prayer; the Bible is used to administer oaths, and many other religious practices and connotations are found in the functioning of government, both state and federal.[14]

Moreover, the wall of separation has not been regarded as a barrier preventing all financial aid to religious institutions. In some instances the aid is direct and substantial.[15] In others the financial aid flows indirectly and incidentally as a result of a tax exemption or other favored treatment,[16] or through an expenditure for a governmental purpose clearly within constitutional limits.[17]

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[14] Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis L Rev 427, 474 (1950).

[15] Bradfield v. Roberts, 175 US 291 (1899) (appropriation for building a ward on property owned by a Catholic hospital); St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill 432, 124 NE 629 (1919) (state payment to a church owned and operated industrial school); Dunn v. Chicago Industrial School for Girls, 280 Ill 613, 117 NE 735 (1917) (state payment to a church owned and operated industrial school); Millard v. Board of Education, 121 Ill 297, 10 NE 669 (1887) (parochial school supported as a public school); State ex rel Johnson v. Boyd, 217 Ind 348, 28 NE2d 256 (1940) (parochial schools operated as a part of the public school system); Rawlings v. Butler, 290 SW2d 801 (Ky 1956) (parochial school supported as a public school).

[16] 26 USC § 501(c)(2), (3), 501(d) (1958) (exemption from income tax of religious organizations and corporations); 26 USC § 107 (1958) (exclusion from gross income of a rental allowance or home given a minister); 26 USC § 170 (1958) (individual taxpayer's deduction for contribution to religious organizations); St. Patrick's Church Society v. Heermans, 68 Misc 487, 124 NYS 705 (1910) free water furnished to a parochial school under a lease to a private company of city owned waterworks); Gubler v. Utah State Teachers' Retirement Bd., 113 Utah 188, 192 P2d 580, 2 ALR2d 1022 (1948) (teachers' retirement act allowed credit for time spent teaching in parochial schools). See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation, 14 Law & Contemp Prob 144 (1949); Note, 3 Rutgers L Rev 115 (1949).

[17] See, Bowker v. Baker, 73 Cal App2d 653, 666, 167 P2d 256, 262 (1946).

For the most part these cases afford us little assistance in the interpretation of our own constitution. This is so because in some of them the controlling constitutional provision differs from ours or is seen against a different historical background. In many instances it is obvious that constitutional principles have been sacrificed to serve urgent needs of the community and state;[18] and in others there simply has not been any real analysis of the problem.[19] Some of these cases are strongly relied upon by defendants. We do not propose to appraise each of the numerous cases which have attempted to draw the line of distinction between expenditures which are within and expenditures which are outside constitutional limits.[20] The reasoning employed in these cases will be examined as we consider defendants' argument.

Defendants' principal argument in support of the statute is that the expenditure of public funds for the purpose of furnishing books to pupils of parochial and public schools benefits the pupils who receive these books and not the schools themselves. The leading case for this proposi-

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[18] St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill 432, 124 NE 629 (1919); Dunn v. Chicago Industrial School for Girls, 280 Ill 613, 117 NE 735 (1917); Rawlings v. Butler, 290 SW 2d 801 (Ky 1956).

[19] Cochran v. Board of Education, 281 US 370, 50 S Ct 335, 74 L Ed 913 (1930); Bradfield v. Roberts, 175 US 291 (1899); Millard v. Board of Education, 121 Ill 297, 10 NE 669 (1887); Borden v. Louisiana State Board of Education, 128 La 1005, 123 So 655, 67 ALR 1183 (1929); St. Patrick's Church Society v. Heermans, 68 Misc 487, 124 NYS 705 (1910); Gubler v. Utah State Teacher's Retirement Bd., 113 Utah 188, 192 P2d 580, 2 ALR2d 1022 (1948).

[20] For a treatment of some of these cases see Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill L Rev 333 (1950); Fellman, Separation of Church and State in the United States; A Summary View, 1950 Wis L Rev 4 7 (1950); Sullivan, Religious Education in the Schools. 14 Law Contemp Prob 92 (1949); Note, 60 Harv. L Rev 793 (1947); Note, 3 Rutgers L Rev 115 (1949); Note, 50 Yale L J 917 (1941).

tion is *Borden v. Louisiana State Board of Education*, 168 La 1005, 123 So 655, 67 ALR 1183 (1929). In that case a statute similar to ORS 337.150 was attacked on constitutional grounds essentially the same as those asserted in the case at bar. The Louisiana court, with three Justices dissenting, sustained the statute on the ground, among others, that the expenditure was for the benefit of pupils and not in aid of schools.[21]

This so-called "child benefit theory" has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those attending parochial schools.[22] The difficulty with this theory is however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil. This criticism is made in *Gurney v. Ferguson*, 190 Okla 254, 255, 122 P2d 1002, 1003-1004 (1942). In passing upon expenditures for the transportation of children attending parochial schools the court said:

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[21] The Borden case was followed in Cochran v. Louisiana State Board of Education, 168 La 1030, 123 So 664 (1929). The latter case was appealed to the United States Supreme Court (281 US 370). The only question on that appeal was whether the act authorized the taking of private property for a private purpose in violation of the Fourteenth Amendment. The applicability of the First Amendment was not considered.

[22] Bowker v. Baker, 73 Cal App2d 653, 167 P2d 256 (1946) (transportation furnished to students of parochial schools); Borden v. Louisiana State Board of Education, 168 La 1005, 123 So 655, 67 ALR 1183 (1929) (textbooks furnished parochial school students); Adams v. County Commissioners of St. Mary's County, 180 Md 550, 26 A2d 377 (1942) (reimbursement to parochial school for the expense of transporting its students); Board of Education v. Wheat, 174 Md 314, 199 A 628 (1938) (transportation furnished to students of parochial schools); Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss 453, 200 So 706 (1941) (textbooks furnished parochial school students); Everson v. Board of Education of Ewing Twp., 133 NJL 350, 44 A2d 333 (1945) (transportation furnished to students of parochial schools).

> "* * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one."

And, as observed by the same court, if the expenditure is not in aid of schools the use of school funds would be unauthorized and illegal.[23]

The leading case rejecting the child benefit theory is *Judd v. Board of Education*, 278 NY 200, 15 NE2d 576, 118 ALR 789 (1938). In that case the validity of a statute authorizing the expenditure of public funds for the transportation of pupils to and from parochial and private schools was in question. The court said:

> "* * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations' (State ex rel. Traub v. Brown, 36 Del. 181, 187, writ of error dis-

[23] Mitchell v. Consolidated School Dist., 17 Wash2d 61, 67, 135 P2d 79, 81-82, 146 ALR 612 (1943). "We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid of the school. Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system."

See also Note, 60 Harv L Rev 793, 797, n. 51 (1947).

missed, Feb. 15, 1938). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid." Id. at 212, 15 NE2d at 582.

The furnishing of textbooks even more clearly constitutes an educational aid. In the Everson case the expenditure for the transportation of parochial school pupils was upheld on the theory that the state could provide for the protection of all school children from traffic hazards irrespective of the religious or public character of schools which they attended. Assuming that the court's reasoning in Everson is sound, it is not applicable to the case at bar. The expenditure of public funds for textbooks supplied to pupils of parochial schools is clearly identified with the educational process, and does not warrant the assumption made in the Everson case that the expenditure is for the general welfare thus justifying the use of the state's police power.

The most recent appraisal of the child benefit theory which has been brought to our attention is *Matthews v. Quinton*,— Alaska.—, 362 P2d 932 (1961). In that case a statute authorizing the transportation of children attending non-public schools was held to be in violation of the Alaska constitutional provision prohibiting the appropriation of public money for the support or benefit of any sectarian, denominational or private school. After a careful examination of the cases in which the child benefit theory had been considered, the court rejected the theory, holding that the furnishing of transportation to pupils of non-public schools constituted a direct benefit to those schools. Mr. Justice Rutledge's dissent in the Everson case was relied upon to support this conclusion. There it was said:

"Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times

in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See Judd v. Board of Education, 278 NY 200, 212, 15 NE2d 576, 582. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without." 330 US 1, 47-48.[24]

We concur in the view that expenditures which aid a child as a pupil of a religious school cannot in that respect be regarded as serving the public welfare as that term is used in defining the state's police power. The reason is stated by Mr. Justice Rutledge in his dissent in *Everson v. Board of Education*, 330 US 1, 53, 67 S Ct 504, 529, 91 L Ed 711, 742, 168 ALR 1392 (1946): the First Amendment "has removed this form of promoting

[24] In some cases it is admitted that the parochial schools are aided by a particular expenditure but that the aid is so unsubstantial that it does not come within the constitutional prohibition against aid to sectarian institutions. Nichols v. Henry, 301 Ky 434, 444, 191 SW2d 930, 935 (1945) held that the aid was so indirect that it was not "sufficient to defeat the declared purpose and the practical and wholesome effect of the law." And it is pointed out that "many expenditures of public money give indirect and incidental benefit to denominational schools" as for example, sewers, sidewalks, streets, police and fire protection. Bowker v. Baker, 73 Cal App2d 653, 666, 167 P2d 256, 262 (1946).

the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair".[25] The dissenting opinion in *Borden v. Louisiana State Board of Education*, 168 La 1005, 1030, 123 So 655, 664, 67 ALR 1183 (1929) expresses the same idea: "Nor is there any room here for the application of the state's police power. That power is not absolute and cannot be invoked to sustain legislative acts which in their operation defeat the objects and purposes of the organic law."[26] We are of the opinion that this analysis is correct.

It is argued that the aid to school children is for a public purpose because the compulsory school law compels all children to attend school and that the state may, therefore, make expenditures to further compliance. But this begs the basic question—the state may not compel compliance through the device of furnishing aid to religious schools if that aid is in violation of the constitution.[27] Moreover, the state does not compel pupils to attend *parochial* schools; "their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern." *Judd v. Board of Education*, supra, 278 NY at 211, 15 NE2d at 582.

The theory has been advanced in some cases that since the parochial schools are performing a task which the state itself must perform through the use of the public schools, the expenditures made are not "aid" but "remuneration" for services rendered and, therefore, not pro-

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[25] "By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar." Rutledge, dissenting in Everson v. Board of Education, 330 US at p. 52.

[26] Accord, Mitchell v. Consolidated School Dist., 17 Wash2d 61, 135 P2d 79, 146 ALR 612 (1943).

[27] Judd v. Board of Education, 278 NY 200, 215, 15 NE2d 576, 584, 118 ALR 789 (1938).

hibited by the constitutional principle of separation of church and state.[28] The distinction is specious and its application could be urged in the justification of the expenditure of public moneys for all educational needs of parochial schools.

In the instant case the evidence establishes that the defendant school district expended approximately $4,000 for textbooks used in the St. John's school. This constitutes a substantial benefit. The benefit is of such a character as to bring it within the proscription of Article I, § 5.

It seems obvious that a slong as church and state continue to exist side by side there cannot be a complete isolation of each, with neither exerting influence upon the other. It is to be expected that in the operation of the state residual benefits will accrue to the various religious groups, not because they are religious organizations but because they are, like other organizations, a part of the community which the state will, and must serve indiscriminately. As Mr. Justice Black observed in the Everson case, the First Amendment (and its counterpart in state constitutions) "requires the state to be neutral in its relation with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them" (330 US 1, 18).

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[28] St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill 432, 124 NE 629 (1919); Trost v. Ketteler Manual Training School for Boys, 282 Ill 504, 118 NE 743 (1918); Dunn v. Addison Manual Training School for Boys, 281 Ill 352, 117 NE 993 (1917); Dunn v. Chicago Industrial School for Girls, 280 Ill 613, 117 NE 735 (1917); Murrow Indian Orphans Home v. Childers, 197 Okla 249, 171 P2d 600 (1946); State ex rel Atwood v. Johnson, 170 Wis 251, 176 NW 224 (1920). *Contra*, Cook County v. Chicago Industrial School for Girls, 125 Ill 540, 18 NE 183 (1888); Synod of Dakota v. State, 2 S D 366, 50 NW 632 (1891). But cf., State ex rel Orr v. City of New Orleans, 50 La Ann 880, 24 So 666 (1898). See Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill L Rev 333 (1950).

Neither the federal nor the state constitutions prohibit the state from conferring benefits upon religious institutions where that benefit does not accrue to the institution as a religious organization. The proscription is against aid to religious *functions:* The benefits of police and fire protection, sewage, disposal, and other community financed services accrue to churches, not as religious organizations but as owners of property in the community.[29] And, the same principle applies when public expenditures benefit individuals who are engaged in carrying out a religious function. A Government pension paid to a clergyman for his services in the Armed Forces may benefit religion but it is not constitutionally prohibited; in such case he receives the bounty not as a cleric but as any other citizen. On the other hand, the state obviously could not pay the clergyman's salary. The point is clearly seen by Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill L Rev 333, 348 (1950):

> "The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way in which the aid is extended. Aid is not normally extended to individuals or institutions by name, but rather to groups or classes of individuals or institutions. Any individual or institution falling under the restrictions of the law, or falling heir to its benefits, does so only as a member of such a group. An individual may be a pupil, a pedestrian, a property owner and a parent. A church is at once a corporation, a piece of property, a building, a meeting place, a religious institution and a non-profit institution. Furthermore, a church may receive police protection when classed as property,

[29] Bowker v. Baker, 73 Cal App2d 653, 666, 167 P2d 256 (1946) erroneously concludes that because "many expenditures of public money give indirect and incidental benefit to denominational schools" as for example, expenditures for sewers, sidewalks, streets and roads, expenditures for the transportation of pupils to parochial schools is also authorized. Since the expenditures in the two types of cases relate to two different functions of the parochial schools the court's conclusion is not logically sound.

> tax exemption when classed as a non-profit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution, since such a class may not validly be given public aid. Since the aid goes to groups rather than the individual components of any one group, the eligibility of an institution to receive public aid would seem to depend on which group it is classed in, rather than on its individual characteristics."[30]

The author then correctly concludes that where the aid is to pupils and schools the benefit is identified with the function of education and if the educational institution is religious, the benefit accrues to religious institutions in their function as religions institutions. And so it is in the case at bar. Granting that pupils and not schools are intended to be the beneficiaries of the state's bounty, the aid is extended to the pupil only as a member of the school which he attends. Whoever else may share in its benefits such aid is an asset to the schools themselves. *State ex rel Traub v. Brown*, 36 Del 181, 172 A 835 (1934). The St. John's school shares in this benefit in a direct and vital way.[31] We attach no significance to the fact that the books are loaned to the pupil or school rather than given outright; in either event a substantial benefit is conferred upon the recipient.[32]

We recognize that whether an expenidture is an aid to a religious institution in its religious function or in some other capacity is a question of degree. But it seems clear that the line must be drawn to include within the constitu-

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[30] See also, Mr. Justice Jackson's dissent in the Everson case, *supra* at 25, 67 S Ct at 516, 91 L Ed at 728.

[31] We do not regard as significant the fact that our constitution does not contain the phrase "directly or indirectly" as some constitutions do. But cf., Judd v. Board of Education, *supra*. See, Note, 60 Harv L Rev 793, 795 (1947).

[32] See Borden v. Louisiana State Board of Education, 168 La 1005, 123 So 655, 67 ALR 1183 (1929) (dissenting opinion)."

tional proscription the furnishing of textbooks to pupils of parochial schools. This conclusion is compelled because such books are an integral part of the educational process. As we have already pointed out, the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John's school. Considering the purpose of Article I, § 5, we are unable to see any substantial distinction between the furnishing of textbooks and the furnishing of blackboards, desks, laboratory instruments, or other equipment clearly necessary to the operation of the school. In comparing these various essential tools we agree with the dissenting opinion in *Everson v. Board of Education of Ewing Twp.*, 133 NJL 350, 359, 44 A2d 33 (1945) that there is no way of "satisfactorily distinguishing one item of expense from another in the long process of child education."

It is argued that the strict notions of separation in vogue at the time of the adoption of our constitutional provisions no longer exist and that these provisions should be interpreted to reflect this change in attitude.[33] Conceding that such change has occurred, there are still important considerations warranting the resolve that the wall of separation between church and state "must be kept high and impregnable." *Everson v. Board of Education*, supra, at p. 18. Among other things, the extension of aid to religious educational institutions could, as observed in *Judd v. Board of Education*, supra at 209, 15 NE2d at 581, "open the door for a dangerous and vicious controversy among the different religious denominations as to who should get

[33] Sullivan, Religious Education in the Schools, 14 Law & Contemp Prob 92, 107 (1949); Note, 36 Geo L J 631 (1948). But cf., Murray, Law on Prepossessions, 14 Law & Contemp Prob 23, 24-26 (1949).

the largest share of school funds."[34] More important, perhaps, is the danger that the acceptance of state aid might result in state control over religious instruction. Some religious leaders, including leaders in the Catholic church, have opposed the acceptance of public funds on this ground.[35] These considerations convince us that the wall of separation in this state must also be kept "high and impregnable" to meet the demands of Article I, § 5.

We are not unmindful of the fact that parents who send their children to Catholic schools must bear the double burden of supporting not only their own parochial schools but the public schools as well. But the added burden is self-imposed; instruction in the public schools is available to all. Catholic schools operate only because Catholic parents feel that the precepts of their faith should be integrated into the teaching of secular subjects. Those who do not share in this faith need not share in the cost of nurturing it. Article I, § 5 so ordains.

Defendants argue that the denial of the use of free textbooks to pupils solely because they attend parochial schools would constitute a violation of the equal protection clause of the Fourteenth Amendment. The argument is without merit. The classification which excludes such pupils from the state's bounty is not only reasonable, it is commanded by the constitution itself.

The principle announced in *Pierce v. Society of Sisters*, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925), relied upon by defendants, is not germaine to the problem before us.

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[34] Everson v. Board of Eduction, 330 US 1, 59 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946) (dissenting opinion); Williams v. Board of Trustees, 173 Ky 708, 191 SW 507, 514 (1917); Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis L Rev 427, 444-45; Note, 47 Colum L Rev 1346, 1355 (1947); Note, 60 Harv L Rev 793, 794 (1947).

[35] 13 Cath Encyc 560 (1912); Note, 50 Yale L J 917, 926, n. 58 (1941).

That case simply recognizes the constitutional right of a parent to pursue freely his religious beliefs by sending his children to parochial schools. The court did not hold; nor was anything said in the case from which it could be implied, that the state must pay for the child's education if the parent elects to use the parochial schools.

The trial judge was of the opinion that the expenditures in question constituted a violation of the constitutional principle of separation of church and state, but he concluded that he was bound by *Everson v. Board of Education*, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946). A decision of the Supreme Court of the United States holding that certain legislation is not in violation of the federal constitution is not an adjudication of the constitutionality of the legislation under a state constitution. In such a case it is not only within the power of the state courts, it is their duty to decide whether the state constitution has been violated. Our views on the policy or interpretation of a particular constitutional provision do not always coincide with those of the Supreme Court of the United States. As we have indicated, *Everson v. Board of Education*, supra, is distinguishable from the case at bar. Even if it were not, our conclusion would be the same.

The judgment is reversed. The trial court is directed to enter a decree in accordance with the prayer in plaintiffs' complaint.

ROSSMAN, J.

I dissent.

Everson v. *Board of Education*, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392, spent unusual effort upon a case which was governed by the same principle of law that governs the case at bar. It stated the principle with clarity and sustained the constitutionality of the challenged statute. We should apply the same principle of law in this case and recognize as valid the statute under attack. Certainty of

law governing the relationship between the state and religious organizations, although difficult of expression, is peculiarly desirable. Confusion and controversy are certain to arise when the United States Supreme Court and this court interpret differently a constitutional principle that should have a single meaning. The Everson decision affords a good opportunity to achieve a high degree of certainty. It should not be cast aside; it should be embraced.

I will now state an additional reason for my dissent. It is commonly recognized that if more than one reasonable interpretation can be placed upon a statute which is challenged as invalid, one of which will sustain its constitutionality and the other of which will render it unconstitutional, the courts must accept the former. The most recent of our decisions which so held is *Federal Cartridge Corporation* v. *Helstrom*, 202 Or 559, 276 P2d 720. I believe that a simple reasonable interpretation can be placed upon ORS 337.150 (the act under attack) which will assure its validity.

A free textbook statute, applicable only to public elementary schools was enacted in 1931. Oregon Laws 1931, Chapter 61, § 1, p. 74. Oregon Laws 1941, Chapter 485, § 1, page 878, amended the act just cited by expanding its scope. The amended act read:

> "The board of directors of each and every school district in the state of Oregon hereby is authorized, empowered and directed, in the manner hereinafter provided, to provide textbooks, prescribed or authorized by law for the free use of all pupils residing in its respective districts and enrolled in and actually attending standard elementary schools. For the purpose of this act a school shall be standard when it meets the standards of the state board of education and all teachers engaged in classroom instruction in said school shall hold a valid Oregon teaching certificate of the proper teacher level. * * *"

It is clearly evident that the legislature, in making the amendment to the 1931 enactment, wished to improve the quality of the denominational schools. It, therefore, rendered textbooks available also to pupils who were enrolled in denominational schools that met qualifications for "standard elementary schools." But prior to the 1941 act a denominational school could select any textbook it preferred and use it in the classroom. Let us at this point assume that the members of the 1941 Legislative Assembly, in voting to extend the free use of textbooks to the pupils in denominational schools, thought that the pupils in those schools would receive superior instruction if the schools adopted the books chosen by the State Board of Textbook Commissioners (ORS 337.010 and 337.050); under those circumstances we surely would be forced to hold that the legislature had in mind the pupils and superior instruction for them—not financial gain for the schools. ORS 337.260 is a clear indication that the legislature is vitally concerned with the contents of the textbooks that are used in teaching the youth of Oregon. We see from the facts just mentioned that when a denominational school requests the local school board to render available to its pupils the use of free textbooks it must accept books chosen by the officials of the public school district and not by itself.

The majority concede that although churches and denominational schools pay no taxes they nevertheless receive many benefits from public moneys. For example, if a fire breaks out in a church the local fire department undertakes to extinguish it. That obviously is done because the church is a local asset and also because the fire, if left unextinguished, might spread to other structures. If a thief invades a church or denominational school he is prosecuted by the public authorities because if he were left to go on his way the property of others might be taken. However, in all instances of that kind the benefits to the religious organization is secondary or incidental. For example, the

street adjacent to a church or denominational institution may be improved at public expense, not for the purpose of conferring a benefit upon the church, but in order to enable traffic to move expeditiously. A church or a denominational school likewise may be enabled to hook up to the public sewer lines, not in order to confer a benefit upon the church, but because to do otherwise might cause an epidemic of disease to arise. The majority quote from a text writer as follows:

> "* * * Furthermore, a church may receive police protection when classed as property, tax exemption when classed as a non-profit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution * * *."

Classifications of that kind solve nothing. They represent wishful thinking whereby cases are solved according to preconceived ideas. To me, it seems we must in all instances endeavor to determine why the statute under attack was enacted. A good instance is ORS 421.035 which reads as follows:

> "There shall be appointed by the board two chaplains of the Oregon State Penitentiary, two chaplains of the Oregon State Correctional Institution and two chaplains of the MacLaren School for Boys. One shall be a non-Catholic clergyman, the other a Catholic clergyman of the archdiocese of Oregon, in each instance. They shall:
>
> "(1) Look after and attend to the spiritual wants of the inmates of the penitentiary, the correctional institution and the MacLaren School for Boys and of all other public institutions in Marion County, when called upon so to do by the inmates, rspectively.
>
> "(2) Visit their respective charges for the purpose of giving them religious and moral instructions * * *."

That enactment represents a clear appropriation of public funds for religious purposes. Yet, when the legislature enacted the statute it was not prompted by a desire to improve the finances of any church, religious denomination or clergyman. It was thinking of the unfortunate individuals who are confined in our penal institutions and was prompted by a hope that if a clergyman, Bible in his hand, called upon them a new light might enter their lives and turn them from law breaking to worthy aspirations. A Salvation Army band, clothed in tattered uniforms but playing some of the church's favorite hymns as it marches through skid row is a greater force for law compliance than a battalion of police officers.

As I have indicated, the act in question clearly can be deemed an educational act. Its purpose was to bring to the avail of the pupils in denominational institutions textbooks which the legislature favored. The legislature was not concerned with any church, but with the youth of Oregon and believed that textbooks chosen by the State Board of Textbook Commissioners would afford superior education to those selected by the denominational schools.

I add that a parochial school is in no sense enriched through the operation of the statute under attack. If, prior to the enactment of ORS 377.150 the parochial school did not provide for its pupils free textbooks then obviously ORS 337.150 did not relieve it of any burden. But, if prior to the enactment of ORS 337.150 the parochial school provided free textbooks, then the act under question does not give to the parochial school any books whatever. ORS 337.200(2) renders it clear that the books are entrusted to the pupil and are not the property of the school. In fact, ORS 337.190 states:

> "All textbooks purchased under ORS 337.150 are, and shall remain, the property of the school district. Upon receipt thereof, each of said books shall be immediately and properly labeled as the property of the school district."

ORS 337.200 renders it the duty of the Superintendent of Public Instruction to see to it that all of the books thus rendered available to the pupils are returned to the school board. Without further analysis I express my conclusion that the act under review is constitutional and that this court should adhere to *Everson* v. *Board of Education*, supra.

Order

(November 15, 1961)

This cause on September 6, 1961, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

It Therefore Is Considered, Ordered and Decreed that the judgment and decree of the court below rendered and entered in this cause be and the same is in all things reversed and set aside and that the cause be remanded to said court with directions to enter a decree in accordance with the prayer in plaintiffs' complaint and in accordance with the opinion of the court herein.

It Further Is Ordered that appellants have and recover of and from respondents their costs and disbursements in this court taxed at $41.

APPENDIX B

IN THE CIRCUIT COURT FOR CLACKAMAS COUNTY, OREGON

On the 2nd day of February, 1960, Judge Holman entered a

Memorandum Opinion

of the Circuit Court, as follows:

This suit has been brought by certain taxpayers in School District 62C against the School Board of the district to prevent the Board from furnishing textbooks at public expense for the use of students at St. John the Apostle parochial school, which is operated within the district by the Catholic Church. O.R.S. 337.150 requires the Board to furnish free textbooks to all children attending schools maintaining standards as determined by the State Board of Education. St. Johns has been certified as maintaining these standards and the School Board has been providing free books. St. Johns gives instructions in the Catholic religion to its students. The evidence indicates and the Court finds that the sole purpose of the Church in conducting the school is to permeate the entire educational process of the children with the precepts of the Catholic religion. There is no serious factual dispute which the Court feels is in any way determinative of the issue.

The only issue in the case is the constitutionality of the Oregon Textbook Law as it provides for free textbooks for use of students of parochial schools. Does this law violate Article I, Section 5 of the Oregon Constitution and the First Amendment to the Federal Constitution as applied to the states by the Fourteenth Amendment? Article I, Section 5 of the Oregon Constitution provides:

"No money shall be drawn from the treasury for the benefit of any religious or theological institution * * *"

The First Amendment to the Federal Constitution states as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, * * *"

For the purpose of deciding this case I can determine no essential difference in the meaning of the provisions of the State and Federal Constitution. In effect, and they have been so construed, they mean that government can do nothing either to help or to hinder religion.

In the case of Cochran vs. Board of Education 281 U.S. 370, 74 L. Ed. 913, the Supreme Court of the United States held that a Louisiana statute providing free textbooks for children in all schools, parochial or otherwise, was constitutional. This decision rested on the power of the State to legislate for the public welfare. No question was raised or point was made of the application of the First Amendment of the Federal Constitution because it was not then recognized that the First Amendment had application to the states, but only the Federal Government.

Since then, the question of the application of the First Amendment was raised in the case of Everson vs. Board of Education 330, U.S. 1, 91 L. Ed. 711. This Court feels that the determination in that case is decisive of the question here. The United States Supreme Court, by a five to four decision, held constitutional a New Jersey statute which provided that the Board of Education of the public schools could pay the cost of transportation on public conveyances of children to certain parochial schools. This case held that the statute was an aid to education and public safety and therefore properly within the power of the state to legislate for the public welfare. The teaching of religion

in the schools to which the children were being transported was held incidental and not violative of the constitutional provision against government aid to religion.

A stronger case can be made for the unconstitutionality of paying the costs of transportation than can be made for the furnishing of free textbooks. The children are being transported to school for the purpose of religious as well as secular education. Therefore the expenditure is a direct benefit to the teaching of religion to the extent of at least a proportionate part of the cost. School books that are furnished free, it might be said, are used entirely in secular education and therefore give no direct aid to religion.

Plaintiffs have attempted to discount the Everson case by contending its was based upon the power of the State to provide for the safety of school children and save them from the hazards of traffic if required to walk to school while, in the present case, textbooks were furnished as actual tools for use in parochial schools. It is a distinction without a difference as affects our problem because the power of the legislative body in each instance, if it exists, must rest on its authority to legislate for the public welfare. In both instances something vital is being furnished for educational purposes. Transportation to a parochial school is a direct aid to the religion that is taught there. The most that can be said of secular textbooks is that they are an indirect aid to religion in that they help the operation of the educational process which is used for religious purposes. If a direct aid is permissible, certainly an indirect one must be.

In principle I cannot distinguish the decision in the Everson case from the present one and therefore hold the Oregon statute constitutional.

However, while I feel obligated to uphold the law as interpreted by the United States Supreme Court, I am not persuaded that its interpretation of the constitutional pro-

hibition is the correct one, and therefore make as vigorous a dissent as I am capable to the rulings of the Court in both the Everson and Cochran cases and to the ruling in this case, for the reasons hereinafter stated.

It is a matter of historical record that a large portion of the original thirteen colonies was settled by persons seeking to escape religious intolerance and coercion. They came so they could worship as they pleased and then in turn, in many instances, became as intolerant and oppressive of the religious beliefs of others as those from which they had sought to escape.

The Federal Constitution as adopted by the colonies had no provisions regarding religion in it except insofar as oaths of office were concerned. It was adopted, however, with the understanding that there would immediately be submitted for approval the matters now incorporated in the first ten amendments. They were immediately submitted and approved. The adoption of the First Amendment was the culmination of a long fight for religious freedom and tolerance which had been spearheaded by Madison and Jefferson.

It is extremely difficult for those of us who have been born and reared in the present atmosphere of religious tolerance which has been insured by the First Amendment to appreciate or visualize conditions which brought about its enactment and similar provisions in state constitutions. The dangers of allowing a government to aid any particular or all religions or to interfere with individual freedom of worship were to the colonists very real and ever present. They are so today if we in any way relax the provisions of the First Amendment. No one can be on the trial bench for any length of time and not have felt the religious pressures involved. Human nature has not changed since the time of Jefferson and Madison. Persons with missionary zeal still exist.

There is always pressure, under the guise of doing good and being helpful to mankind, to do the expedient thing in an individual instance and to relax the constitutional prohibition because there is no present intention to help religion. However, if the rule is relaxed in even the slightest degree, there are those who will seek to use the relaxation for the purpose of fostering their own religious beliefs or interfering with the beliefs of others.

How can the rulings in the Everson and Cochran cases as well as the decision in the present case be such a relaxation of the rule for the separation of church and state as to be dangerous? If these rulings are correct there is nothing in principle or at law which prohibits the legislature from authorizing the expenditure of public money to furnish teachers to the children at parochial schools as long as they teach only secular subjects, teaching supplies used exclusively for secular subjects, scientific laboratory equipment, athletic equipment, gymnasiums and classrooms as long as they are not used for religious purposes and as long as title remains in the public. I am not even sure that the teaching of religion in classrooms furnished at public expense would not be permitted because, if you can say that a child can be transported to school at public expense where he is taught religion and that religious teaching is only incidental to his transportation, you can say the same about furnishing classrooms that are used for both purposes. The proportionate cost between the religious and the secular is the same for classrooms as it is for transporting children to the classrooms. Classroom and transportation to school both promote public welfare. There is no difference in theory between the statute which provides that all children are entitled at public expense to free and equal use of textbooks and one which provides for the free and equal use of classrooms for them. If the criterion is whether the children are benefited and thus the general welfare benefited, the entire cost of the parochial schools at public expense can be justified.

In a situation where the public facilities and schools are disbursed among the Lutherans, Adventists, Catholic, Episcopalians, etc., each sect will be competing for the "lion's share" of public money and bringing religious and political pressure to get it, to the disadvantage of less powerful religious groups, each contending for requirements before funds are allotted which they can meet but which other less wealthy sects cannot. Things of this nature were feared by Madison and Jefferson. They desired to keep religious controversy out of public life by denying to every denomination any advantage from getting control of public policy.

Defendants and the intervenor attempt to take refuge in the words of the statute which say that the books are for "free and equal use of all pupils." They contend that this conclusively shows that the books are for the benefit of the children and not the schools and therefore not an aid to religion. If the books are furnished to the children alone and not the school, why then does the school have to meet certain governmental standards before the children who attend are entitled to free books? Is not a child attending a poorly operated school in need of free books just as much, if not more so, than one attending a school that is well run? Are the children of poor sects in any less need of free textbooks because their church cannot afford concrete fireproof buildings? The standards of the schools, not the needs of the children, determine their eligibility to free use of textbooks.

This Court believes that the questions of whether the benefit of free textbooks is to the child, the parents, or the school, whether there is a direct or indirect aid to the teaching of religion, whether it is a proper exercise of the public welfare power of the legislature, are all beside the point. There is only one question: Does the furnishing of free textbooks to the students of St. Johns help or foster the teaching of religion in any degree whatsoever? If it does, it is contrary to the First Amendment.

The answer is obvious. Anything that assists a religious sect to conduct a separate school where all instruction is permeated with religious overtones is an aid to religion. The proof in this case is conclusive that the sole purpose in maintaining the private school is to promote religion. It makes no difference whether books, teachers, equipment, transportation or buildings are furnished, nor does it make any difference to whom they are furnished. In truth, all are an integral part of the whole which makes up the school and the educational process. You cannot logically distinguish one from the other. They constitute the elements of an educational process permeated with religious purpose.

After all the arguments are made on both sides of the many facets of this perplexing problem, it is inescapable that the crux of the matter is the conflict between the power of the legislative arm of government to pass laws for the general welfare on the one hand, and the constitutional prohibition against governmental support of any or all religions on the other. No one can deny that the teaching of the Christian religion and Christian piety in any of its forms promotes the general welfare. Therefore, if the welfare power is paramount to the constitutional prohibition it would have been useless to include such a prohibition in the Constitution. It can only logically be concluded that the constitutional prohibition is paramount when a conflict occurs. This must be true even where the aid to public welfare is direct and the aid to religion is indirect. If this were not so the constitution could be successfully emasculated by indirection.

For the reasons above I accede to the opinion of the four dissenting justices in the Everson case and emphatically dissent from this decision which I am required to make as a result of the majority opinion of the United States Supreme Court.

An order may be presented to the Court for signature in conformance with this ruling.

On the 31st day of March, 1960, the Circuit Court entered its

Judgment

in which it was recited that, "the Court having heretofore rendered its Memorandum Opinion dated February 2, 1960, containing its findings and conclusions of the Court,

"IT IS HEREBY ORDERED, DECREED and DECLARED:

"That the Amended Complaint of the Plaintiffs be and the same is hereby denied, and the Defendants and the Intervenor have judgment against the Plaintiffs without costs to any of the parties."